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IN THE

Supreme Court of the United States

October Term, 1958

No. 1023

EDWARD PETER CALLAS, an infant under the age of fourteen years, by Helen Callas, his Guardian ad Litem and Edward George Callas

Petitioners

—against—

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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On Petition

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To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Edward Peter Callas, an infant under the age of fourteen years, by Helen Callas, his Guardian Ad Litem and Edward George Callas, prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit filed April 1, 1958 affirming a final order entered in the United States District Court for the Eastern District of New York on June 25th, 1957 by the Honorable Morti-

mer W. Byers, dismissing the complaint of petitioners for serious personal injuries sustained by the infant Edward Peter Callas (loss of service and medical expenses sustained by his father Edward George Callas) on February 20, 1955 on the beach at Kwajalein, Marshall Islands.

The opinion of the Court of Appeals, made a part of the appendix to this petition, with a dissenting opinion by circuit Judge Lumbard is not yet officially reported. The opinion of Judge Byers of the District Court granting the motion to dismiss the complaint is set forth on page 20 to 23 of the appendix for the plaintiffs-appellants in the court below and is officially reported in 152 F. Supp. 17.

Jurisdiction

The jurisdiction of this Court is based upon the provisions of 28 U. S. C. 1254 (1). The order of the Court of Appeals affirming the order of the United States District Court for the Eastern District of New York was entered on April 1, 1958, having been argued on February 10, 1958 and decided April 1, 1958. Galston *D.J.* and Hincks *C.J.* were for affirmance (writing both an opinion and concurring opinion); Lumbard *C.J.* was for reversal and remand and wrote a dissenting opinion.

Question Presented

1. Do the majority opinions introduce a harsh interpretation of the Federal Tort Claims Act, that bars a citizen from bringing suit against the government. although the accident occurred at a situs that the Department of Interior had indicated was governed by "such laws of the United

States as by their force are to be effective * * * and the common law of England and all statutes of Parliament in and thereof in force and effect on July 3, 1776 as interpreted by American Courts."

One of the exclusions found in the Federal Tort Claims Act is "(k) any claim arising in a foregin country." Up to the present time all dismissal of actions under this section have been solely on theory that:

> "* * * Congress apparently was willing that such claims be made against the United States in conformity with the law of any State, territory or possession of the United States, but it did not consent to expose the government to claims predicated on the laws of a foreign country." (*Brunell* v. *U. S.*, 77 F. Supp. 68.) (Accident occurred in Saipan.)

Another case on the subject is that of *Cobb* v. *United States*, 191 F. 2d 604 (C. A. Calif. 1951), cert. denied 342 U. S. 913, 72 S. Ct. 96 L. Ed. 683. In this *Cobb* case, it was held that an American who was injured on the Island of Okinawa could not sue, although the island is governed by the American military forces, the tort law applied would be that of Japan and it was concluded that the purpose of this exception was to avoid subjecting the United States to liabilities depending upon the laws of a foreign power.

The same result was arrived at in *Brewer* v. *United States*, 79 F. Supp. 405 (D. C. Cal.) where the accident also occurred on the Island of Okinawa and the court held that the Island was military occupied territory and the Laws of Japan governed the liability of the accident.

In *United States* v. *Speler*, 338 U. S. 217, 70 S. Ct. 10, 94 L. Ed. 3, the accident occurred at a Newfoundland air base

under long term lease to the United States and this Court held that the arrangements under which the leased bases were acquired did not, and were not intended to transfer sovereignty over the leased areas from Great Britain to the United States, therefore the laws of Great Britain applied to the accident and the case was lost because this court held that Congress was unwilling to subject the United States to liabilities depending upon the laws of a foreign power.

Here the infant plaintiff, whose father was a member of the Armed Forces, suffered horrible injuries when he picked up a shell that was on the beach on Kwajalein Island (one of the Marshall Islands) and same exploded and caused him to lose his right hand.

Because of the information received from the Department of Interior, the motion to dismiss the complaint for lack of jurisdiction involved new questions of law and have resulted in three different opinions in the Court of Appeals.

Reasons for Granting the Writ

The majority decisions are in conflict with all controlling decisions of this and other Federal Courts as to the reason for the exception. It was previously understood that when Congress used the term "foreign country" it meant all lands other than those for which it is the Supreme Legislative body; that the tort must have been committed on lands within the boundaries of the United States or its territories and possessions. This case fits into the above description and in order to defeat this infant the District Court opinion and the majority opinions of the Court of Appeals had to indulge in unrealistic and fanatical dis-

tinctions that completely befog the settled law and defeat the intentions of Congress to mitigate the unjust consequences of sovereign immunity from suit.

Wherefore, petitioners respectfully pray that a writ of certiorari should be granted and that this court reverse the courts below and reinstate the complaint of petitioners, inasmuch as the majority opinions of the Court of Appeals are so clearly erroneous, or any other relief as the Court may deem just and proper.

Respectfully submitted,

EDWARD PETER CALLAS, an infant by HELEN CALLAS, his Guardian ad Litem and EDWARD GEORGE CALLAS,

Petitioners.

By JOSEPH A. SOLOVEI

Attorney

Dated: Brooklyn, New York
May 16, 1958

HERMAN E. HOBERMAN
BERNARD MEYERSON
on Petition

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 163—October Term, 1957.

(Argued February 10, 1958 Decided April 1, 1958.)

Docket No. 24854

EDWARD PETER CALLAS, an infant under the age of fourteen years, by HELEN CALLAS, his Guardian ad Litem, and EDWARD GEORGE CALLAS,

Plaintiffs-Appellants

—against—

UNITED STATES OF AMERICA,

Defendant-Appellee

Before:

HINCKS and LUMBARD, *Circuit Judges*, and GALSTON, *District Judge*.

Appeal from an order of Mortimer W. Byers, *United States District Judge*, Eastern District (152 F. Supp. 17) dismissing the complaint. Affirmed.

HERMAN E. HOBERMAN, Brooklyn, N. Y. (Bernard Meyerson, Brooklyn, N. Y., of counsel) *for Plaintiffs-Appellants.*

CORNELIUS W. WICKERSHAM, JR., U. S. Attorney, Eastern District of New York (Margaret E. Millus, Brooklyn, N. Y., Assistant U. S. Attorney, of counsel), *for Defendant-Appellee.*

GALSTON, *District Judge*:

The question involved on this appeal relates to a construction of the Federal Tort Claims Act. The facts are not in dispute.

It appears from the complaint that the action is brought pursuant to the Federal Tort Claims Act. It alleges that on February 20, 1955, the infant Edward Peter Callas was lawfully playing on the beach at Kwajalein in the Marshall Islands, and he was injured by the explosion of a round of ordnance. The complaint alleges that this explosion was brought about by the carelessness of the United States of America. The plaintiffs are residents of the Borough of Brooklyn.

The answer denies negligence, and for a separate and complete defense alleges that the injuries were sustained as a result of the boy's own failure to exercise due care.

But we do not have to consider the merits. The sole question for decision is jurisdiction.

From the answer it appears that following the attack on Pearl Harbor, our Government declared war on the Japanese Government and conducted a military campaign in the South Pacific on various islands, including the Island of Kwajalein. That island, at the beginning of the campaign, was occupied by enemy troops. Following a success-

ful termination of the attack on the island, the United States Military Forces occupied the island. The answer alleges that claims brought as a direct result of the Military and Naval efforts of the United States Government during the conduct of a war are specifically excluded under the Federal Tort Claims Act.

It cannot be contended that the Island of Kwajalein is a part of the territory of the United States. The Federal Tort Claims Act, Title 28 U. S. C. Section 2680(k), excludes any claim arising in a foreign country.

As to Kwajalein, on February 20, 1955, when the plaintiff's injury occurred, the United States stood not as a sovereign but as a trustee under the United Nations.

A stipulation entered into between the parties to this action on May 20, 1957 recites that the sovereignty of the Island of Kwajalein, in the Marshall Islands group, was governed by a trusteeship agreement entered into on July 18, 1947 by the United States of America, which reads as follows:

> "The Territory of the Pacific Islands, consisting of the islands formerly held by Japan under mandate in accordance with Article 22 of the Covenant of the League of Nations, is hereby designated as a strategic area and placed under the trusteeship system established in the Charter of the United Nations. The Territory of the Pacific Islands is hereinafter referred to as the trust territory.
>
> "The United States of America is designated as the administering authority of the trust territory."

Despite the powers undertaken by the United States pursuant to the trust agreement, for purposes of the Federal Tort Claims Act, 28 U. S. C. A. Section 2680(k), it cannot follow that Kwajalein became part of the United States. It remained a foreign country. In *United States* v. *Spelar*, 338 U. S. 217, it was said that "the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States." And the reason for this, as *Spelar* points out, was because under the Act the *lex delicti* was applicable and consequently, if "foreign countries" were to be included, it would lead "to a great deal of difficulty." Although the nature of this "difficulty," which was recognized in the legislative history of the Act, was not particularized we think it reasonable to infer that Congress foresaw that a United States court might find it difficult to ascertain and apply the local law in regions not under the sovereignty of the United States—especially in regions where the local law had not crystallized through established legislative or judicial definition or where its content was subject to change by administrative authority. In *United States* v. *Spelar* an American air base in Newfoundland was held to be a foreign country for purposes of the Federal Tort Claims Act.

The question presented on this appeal as to what is a foreign territory under the Federal Tort Claims Act, is thus not a new one. Indeed the question was well discussed by Judge Ryan in 1948 in *Brunell* v. *United States*, S. D. N. Y. 77 F. Supp. 68. That case involved the status of Saipan, under the act in question. Judge Ryan made a careful review of the authorities and concluded that Saipan was a foreign country.

Whatever administration is exercised by the United States Government is solely and wholly in the capacity of a trustee designated by the United Nations. Whether the United Nations may be responsible for the acts of its trustee is not before us. Nor, indeed, is the United States being sued as a trustee. On the contrary, it is sued in its status as a sovereign—i.e., a sovereign of its own territorial components, i.e., the forty-eight States of the Union and the territories concerning which the United States has the power to enact laws. It makes no laws as a sovereign for the Island of Kwajalein. From a letter attached to the affidavit of counsel for the plaintiffs which he received from the Director of the United States Department of the Interior, it appears

> "that any law of negligence which may be in force on Kwajalein is contained in the local common law or the British common law as it existed before July 4, 1776."

Certainly such is not the law of the United States, for there is no general common law within the federal jurisdiction. (See *Erie Rr.* v. *Tompkins*, 304 U. S. 64.)

It must be insisted too that a sovereign can be sued only with its consent. That rule was set forth by Chief Justice Jay in *Chisholm, Executor* v. *Georgia*, 2 Dall. 419 (1793); see also *Cohens* v. *Virginia*, 6 Wheat. 264 (1821), in which Chief Justice Marshall asserted:

> "The universally received opinion is that no suit can be commenced or prosecuted against the United States: * * *."

Later, in *U. S.* v. *Clarke*, 8 Pet. 436 (1834), Chief Justice Marshall said that the United States is

> "not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it."

That being so, and the consent in this case being wholly absent, the judgment of the District Court is affirmed.

HINCKS, *Circuit Judge* (concurring):

I fully concur in Judge Galston's opinion but also place reliance on additional considerations. As was recognized in *Cobb* v. *United States*, 9 Cir., 191 F. 2d 604, whether the Pacific Islands are a "foreign country" within the meaning of the Federal Tort Claims Act is a question of considerable difficulty. But whether the problem is reached by the common-sense approach advocated by Judge Pope in his concurring opinion in the *Cobb* case (which strongly appeals to me) or by the more legalistic approach of the majority opinion, the result here is the same. For if Okinawa was properly classified as a "foreign country" notwithstanding the unlimited power of the United States which had occupied and thereafter (until the date of the *Cobb* decision) maintained absolute control of the island by force of arms, *a fortiori* is Kwajalein a foreign country. For the comparable power which the United States had acquired over Kwajalein was voluntarily translated into a fiduciary responsibility to the United Nations which carried specified accountability to its Security Council through an express trust agreement, 61 Stat. 3301, approved by the Joint Resolution of Congress of July 18, 1947, c. 271, 61 Stat. 397, Historical Note to §1435 of Title 48 U. S. C. A.

By the terms of this trust agreement the United States became the "administering authority of the trust territory," which included Kwajalein, Article 2, and as such was to have "full powers of administration, legislation, and jurisdiction over the territory subject to [see Article 6] the provisions of this agreement, and may apply to the trust territory * * * such of the law of the United States as it may deem appropriate to local conditions and requirements." Article 3. However, Article 6 provided that the administering authority "shall give due recognition to the customs of the inhabitants in providing a system of law for the territory * * *." Article 11 provided that "the administering authority shall take the necessary steps to provide the status of citizenship of the trust territory for the inhabitants of the trust territory." And by Article 13 the United States agreed that subject only to security restrictions, Articles 87 and 88 of the United Nations Charter (59 Stat. 1050-1) should be applicable under which it was provided that the administering authority (the United States) would annually submit to the Security Council, under its direction, annual reports on the "political, economic, social and educational advancement of the inhabitants of the trust territory."

In view of the foregoing outline of the powers and responsibilities of an administering authority of the mandated islands, it seems clear that as to Kwajalein sovereignty did not devolve upon the United States. The limited functions and the supervised responsibilities which it assumed under its trust agreement were fundamentally incompatible with sovereign status.

> "In spite of the unsolved question of exactly where sovereignty over mandated territories and over trust

territories rests, there is general agreement with respect to certain aspects of the question. In the first place, there seems to be general concurrence with respect to the present trust territories, as there was with respect to mandated territories, that wherever sovereignty does rest it is not with the administering power. This view has been reenforced by statements of the United States, the United Kingdom and Australia as administering authorities of trust territories. Each of these has stated on separate occasions that it does not regard its administration of the trust territory as implying any claim of sovereignty." Francis B. Sayre, "Legal Problems Arising From the United Nations Trusteeship System," 42 Amer. J. Int'l Law 269, 271.

The same considerations go far to persuade me that within the meaning of the Federal Tort Claims Act, even if applicability of that Act depends on factors other than United States sovereignty over the place of the delict, Kwajalein is a foreign country. Other considerations add persuasive corroboration to that conclusion. In its 8th Annual Report to the Security Council pursuant to Article 88 of the United Nations Charter, the United States declared that the inhabitants of the trust territory of he Pacific Islands were citizens thereof and might acquire United States citizenship in the same manner as other immigrants to the United States. By the President's Proclamation, No. 2980, of June 30, 1952, 17 F. R. 6019, July 4, 1952, published beneath 8 U. S. C. A. §1151, under §201(b) of the Immigration and Nationality Act of 1952, 8 U. S. C. A. §1151(b), "Pacific Islands (trust territory, United States administered)" was assigned an immigration quota. This assignment was in conformity with the definition of

§101 of said Act, 8 U. S. C. A. §1101, that " * * * territories under mandate or trusteeship shall be regarded as separate foreign states." Cf. *Hichino Uyeno* v. *Acheson*, 96 F. Supp. 510, 515. That natives of Kwajalein are thus classified with natives concededly "foreign" and treated as aliens for purposes of our immigration laws, is a factor which strongly suggests that that island comes within the purview of a "foreign country" as that term was used in the Tort Claims Act. Moreover, the distant location of the island, its customs and the ethnic strain and language of its natives, are further factors which, I think, in the absence of cession or *de jure* annexation* tend to bring it within the ordinary American concept of a "foreign country."

I find no precedent whatever for reversing the decision below. On the other hand, in addition to the cases we have cited *Burna* v. *United States*, 4 Cir., 240 F. 2d 720, lends powerful support to Judge Byers' thoughtful opinion below. I agree with the rationale of the opinion in that case. That the administration of Kwajalein by the United States was under international trusteeship is a fact which does not remove this case from the reach of the *Burna* opinion.

LUMBARD, *Circuit Judge* (dissenting):

The sole issue before this Court is whether Kwajalein is a "foreign country" within the meaning of the Federal Tort Claims Act, 28 U. S. C. A. §2680(k). If it is not then this suit may be brought for injuries suffered by Edward Peter Callas, the infant son of a naval officer stationed on Kwajalein, when a round of ammunition he had picked up on the beach on February 20, 1955 exploded in his hand.

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* Cf. *Downes* v. *Bidwell*, 182 U. S. 244, 346.

It is generally agreed that "foreign country" as used in the Federal Tort Claims Act is not a term of art and that its construction is dependent on the intent of Congress in excluding claims arising in foreign countries from the remedial provisions of the Act. See e.g. *Burna* v. *United States*, 240 F. 2d 720 (4 Cir. 1957). Although the bases for the exclusion are not wholly clear, some have been suggested. The Supreme Court in *United States* v. *Spelar*, 338 U. S. 217 (1949) suggested that Congress was reluctant to predicate governmental liability on whatever the foreign tort law might happen to be. It has also been noted that the absence of district courts outside the United States would cause difficulties and expense in litigating claims in a forum far removed from the scene of the tort. *Burna* v. *United States, supra*, at 722. Courts have also ascribed a Congressional intent to preclude claims arising outside the United States and possessions where it is sovereign or in areas commonly understood and thought of as alien and foreign. See *United States* v. *Spelar, supra;* concurring opinion of Judge Pope in *Cobb* v. *United States*, 191 F. 2d 604 (9 Cir. 1951), cert. den. 342 U. S. 913.

In the international law sense, Kwajalein and related islands hold a unique position. A coral atoll and site of a United States naval station, Kwajalein is part of the Marshall Islands, this island group being one of the six districts of the Trust Territory of the Pacific Islands.[1] The territory is controlled by the United States by virtue of

[1] See generally, Report of the Special Subcommittee on Territorial and Insular Affairs of the Committee on Interior and Insular Affairs, Trust Territory of the Pacific Islands, 83d Cong., 2d Sess. (1955).

a Trusteeship Agreement with the United Nations, allowing in practical effect the exercise of full sovereign power by the United States although a residual sovereignty remains in the territory, divisions thereof, or the United Nations. See 1 Oppenheim, International Law 236 (8th Ed. 1955) for the latter view. In common with all trust territories, termination of the trust requires the consent of the administering authority as well as the consent of the United Nations. Moreover, this territory is the only area designated as a strategic trust, a designation which results in the United States being responsible to the Security Council rather than the General Assembly for administration of the trust, permits preferential treatment of the United States in economic and commercial matters, and allows this country unilaterally to declare all or any part of the islands a closed area within which the United States may determine the extent to which trustee functions shall be exercised and from which it may bar anyone, including the United Nations.

The area is administered from a headquarters on Guam, a territory of the United States, and for the most part through the Department of the Interior. A system of courts has been established, applying local law and law which this country has introduced through codes, orders, and Congressional legislation. The local law apparently pertains primarily to property rights and criminal acts, and personal injury law, at least to the extent that United States citizens are involved, apparently would be based upon an incorporation of United States concepts in the absence of developed indigenous law. This is apparently what the Director of the Office of Territories of the Depart-

ment of the Interior had in mind in his letter, referred to by Judge Galston, when he stated that the law of the trust territory included "• • • the common law of England and all statutes of Parliament in and thereof in force and effect on July 3, 1776, as interpreted by American courts."

The Charter of the United Nations and the Trusteeship Agreement impose binding legal obligations upon this country to promote self-government and other enumerated objectives. It is clear, however, that political development in the territory is elementary and that it will be a considerable time before the trust obligations are fulfilled and the trust terminated. Although the purpose of the trust is to prepare for independence, the furtherance of that purpose will require administration by the United States for an indefinite period in the future.

One other factor should be noted. By the venue provisions of the Act, 28 U. S. C. A. §1402(b), civil actions on a tort claim against the United States "• • • may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred." Since there is no district court in the territory where an action may be brought, see 28 U. S. C. A. §1346(b), the practical effect is to restrict suits against the government for claims arising in the trust territory to those prosecuted by residents of the United States.

Pulling these threads together, it is apparent that the United States acts as sovereign in the area although theoretically sovereignty lies elsewhere, that the administration is closely tied in with the administration of overseas territories and possessions, which are certainly not "foreign

countries."[2] that insofar as we are presently advised the law to be applied is general tort concepts as developed by United States courts and introduced into the territory because of United States control, and that as a practical matter actions are restricted to those by United States residents who, it is quite apparent, would ordinarily be in the islands only because of this country's interest in the trust territory. I do not think Congress intended that United States residents injured through the negligence of the United States in an area so controlled and administered by the United States and whose claims are based on general United States tort law should be remitted to the legislative machinery of private bills. In my opinion, Kwajalein is not now a "foreign country" as Congress used the term in the Federal Tort Claims Act and was not on February 20, 1955.

I would reverse the order of the District Court and remand for further proceedings.

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[2] The people of our territories and possessions are citizens of this country, except for American Samoa and Swains Island, whose people are nationals. 8 U. S. C. A. §§1101(a)(29), 1101(a)(38), 1408. The Canal Zone occupies a special status which is in some respects analogous to that of the trust territory although it is permanently and more closely tied to the United States. Its people are not citizens or nationals, 8 U. S. C. A. §1403, and although this country has full rights of use, occupation and control, it does not "own" the area. See 1 Oppenheim, International Law 458 (8th Ed. 1955). It is clear, however, that Congress intended the Federal Tort Claims Act to apply since it expressly extended jurisdiction to try such actions to the Canal Zone. 28 U. S. C. A. §1346(b).

Order of Affirmance of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of April, one thousand nine hundred and fifty-eight.

Present:

HON. CARROLL C. HINCKS,
HON. J. EDWARD LUMBARD,
Circuit Judges,

HON. CLARENCE G. GALSTON,
District Judge.

EDWARD PETER CALLAS, an infant under the age of fourteen years, by HELEN CALLAS, his Guardian ad Litem, and EDWARD GEORGE CALLAS,

Plaintiffs-Appellants,

—v.—

UNITED STATES OF AMERICA,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of New York.

Order of Affirmance of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Order and Judgment Entered on Order of Affirmance

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

Civil Action No. 15979

EDWARD PETER CALLAS, an infant under the age of fourteen years, by HELEN CALLAS, his Guardian ad Litem, and EDWARD GEORGE CALLAS,

Plaintiffs,

—against—

UNITED STATES OF AMERICA,

Defendant.

At Brooklyn, New York, in said District, on the 13th day of May 1958.

Plaintiffs having appealed from an Order of this Court entered on the 25th day of June 1957, dismissing the Complaint, and the said appeal having been duly heard by the United States Court of Appeals for the Second Circuit, which Court affirmed the aforesaid Order, and the judgment of the said Court of Appeals having been duly filed in this Court on April 18th, 1958,

Now, on motion of Cornelius W. Wickersham, Jr., United States Attorney for the Eastern District of New York, attorney for defendant, it is

Order and Judgment Entered on Order of Affirmance

ORDERED, ADJUDGED AND DECREED, that the judgment of the United States Court of Appeals for the Second Circuit be, and the same hereby is made the order and judgment of this Court; and it is further

ORDERED, ADJUDGED AND DECREED, that the Order of the District Court entered on the 25th day of June 1957 be, and the same hereby is affirmed.

MORTIMER W. BYERS
U. S. D. J.